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IN THE

Supreme Court of the United States

October Term, 1989

CHARLES SCULLY, Superintendent of
Greenhaven Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

- against -

FRANK C. PETERSON (80-A-1720),

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule announced in Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) -- that where a state court does not indicate whether it has passed upon a federal question, there is a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved in this Court can affirmatively show the contrary" -- should apply to habeas corpus proceedings?

2. Whether "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court review the merits of a constitutional claim raised where no trial objection was made in state court and a federal appeals court would have been without authority, absent "plain error," to review the claim were the case a federal, not state prosecution?

3. Whether the interest in federal-state comity precludes the application of the new rule of construction announced in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), to cases in which the state appeals were decided prior to it?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89 -

CHARLES SCULLY, Superintendent of Greenhaven Correctional Facility, and STATE OF NEW YORK,

Petitioners,

-against-

FRANK C. PETERSON (80-A-1720),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney, on behalf of Charles Scully, Superintendent of the Greenhaven Correctional Facility, and the State of New York, petitions for a writ of certiorari to

review an order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the New York Supreme Court, Appellate Division, First Department, affirming respondent's conviction (App. Exh. A, pp. 1-5)*, is reported as People v. Peterson, 116 A.D.2d 461, 497 N.Y.S.2d 867 (1986). The certificate denying respondent's application for leave to appeal to the New York Court of Appeals (App. Exh. B, pp. 6-7) is reported as People v. Peterson, 67 N.Y.2d 948, 502 N.Y.S.2d 1042, 494 N.E.2d 127 (1986).

The Magistrate's report and recommendation (App. Exh. C, pp. 8-49) is unreported. The memorandum opinion and order of the United States District Court for the Southern District of New York (App. Exh. D, pp. 50-60), Peterson v. Scully,

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*The Appendix to the petition is separately bound.

No. 87 Civ. 1597 (CSH)(S.D.N.Y. Jan. 11, 1989), is unreported. The order of the United States Court of Appeals for the Second Circuit vacating and remanding the action to the District Court (App. Exh. E, pp. 61-73) is reported as Peterson v. Scully, 896 F.2d 661 (2d Cir. 1990).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit vacating and remanding the petition to the District Court for consideration on the merits was entered February 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2243 provides, in pertinent part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

In May, 1977, shortly after his release from prison on parole, Respondent Frank C. Peterson, hereinafter Peterson, began a series of sexual attacks and robberies upon women which followed a distinctive pattern. Peterson would follow the women into their locked buildings and force them to take him into their apartments. Once inside the apartments, he made his victims undress and perform fellatio upon him. He then raped them, placed them in a closet or bathroom, and ordered them to count aloud while he stole property from the apartments and fled.

On October 28, 1977, Peterson was arrested immediately following an attack upon a woman. In multiple indictments, he was charged with numerous

counts of rape, robbery, and sodomy, arising out of separate attacks upon six different women.[1]

Peterson was tried on New York County Indictment Number 5123/77, charging him with robbery and sexual crimes against two victims, Cheryl Dolinger and Dianne Culpen, before Justice Burton B. Roberts and a jury. On May 12, 1980, Peterson was found guilty of two counts each of Rape in the First Degree (New York Penal Law §130.35), Sodomy in the First Degree (New York Penal Law §130.50), and Robbery in the First

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[1]Peterson was tried first on New York County Indictment Number 4625/77, charging him with the rape and robbery of Gloria Affigne. After a jury trial in Supreme Court, New York County, before Justice Dennis Edwards, Peterson was found guilty as charged. Peterson brought a habeas corpus petition to challenge the consecutive sentences imposed as a result of the conviction on Indictment Number 4625/77 in the United States District Court for the Southern District of New York. The District Court permitted withdrawal of that petition on August 19, 1988. Peterson v. Scully, No. 88 Civ. 1018 (RJW)(S.D.N.Y. Aug. 19, 1988).

Degree (New York Penal Law §160.15).[2] Peterson was sentenced to indeterminate terms of imprisonment of from twelve and one-half to

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[2]Other counts in Indictment Number 5123/77 charged defendant with the rape and robbery of a third victim, Hephzibah Barrette. On the People's motion, the counts relating to Barrette were severed prior to trial. Following Peterson's conviction, the counts relating to Barrette and all the counts contained in a third indictment were dismissed on the People's motion. The basis of the motion was that certain "capping" provisions in New York's Penal Law provided that the effective length of Peterson's sentences would not be increased by additional convictions and therefore that no useful purpose would be served by prosecuting him for the untried counts.

twenty-five years. [3] It is his custody on this conviction which is at issue.

THE STATE APPEAL

Peterson appealed to the New York Supreme Court, Appellate Division, First Department. There he claimed, inter alia, that he had been deprived of a fair trial by the trial judge's biased intervention into the examination of the witnesses. In response, the People argued that the claim had not been preserved for review on

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[3]Justice Burton B. Roberts ordered that the sentences imposed for the three counts relating to each victim run concurrently, but consecutively to the terms imposed for the counts relating to the other victim. Justice Roberts also ordered Peterson's sentences to run concurrently with other sentences imposed on September 6, 1979, following Peterson's conviction on unrelated counts of rape, sodomy, and robbery. The sentences from that conviction aggregate to a total of twenty-five to fifty years imprisonment. In addition, the judge ordered Peterson's sentences to run consecutively to the approximately fifteen years Peterson still owed on sentences imposed for several 1971 convictions. Peterson is currently serving these sentences.

appeal by trial objection and, in any event, was without merit.

On January 2, 1986, the Appellate Division unanimously affirmed Peterson's conviction (App. Exh. A, pp. 1-5). In a memorandum opinion, three of the five justices stated that they were affirming the conviction "in view of the overwhelming proof of [Peterson's] guilt," but added,"[w]e must note, however, the inappropriateness of [the] Criminal Term's unwarranted and excessive intrusion into the conduct of the trial . . . . Had the proof of guilt not been established by such overwhelming evidence, as was here presented, the result of our review might well have been different" (App. Exh. A, p. 4). Justice Sidney Asch concurred in the result only (App. Exh. A, p. 4). Justice Theodore Kupferman, in a separate memorandum opinion, wrote, "I would merely affirm" (App. Exh. A, p.5).

Peterson then sought leave to appeal to the

New York Court of Appeals. That application was referred first to Associate Judge Fritz W. Alexander and then to Associate Judge Vito J. Titone. In his application, Peterson argued that his judicial interference claim should be reviewed. In opposition, the People argued that the judicial interference claim could not be reviewed because it had not been preserved for review on appeal. The People pointed out that New York law does not permit harmless error analysis as to a judicial interference claim. Noting that the Appellate Division's opinion, itself, contained no reference either to harmless error or any decision which rested on a finding of harmless error, the People argued that that court, having found the proof of Peterson's guilt truly overwhelming, declined to exercise its interest of justice jurisdiction to consider the unpreserved

judicial misconduct claim as an issue of law.[4] On April 29, 1986, Judge Titone issued a certificate denying leave to appeal to the Court of Appeals (App. Exh. B, pp. 6-7).

THE FEDERAL HABEAS CORPUS PROCEEDING

The District Court

In March 1987, Peterson filed a petition for a writ of habeas corpus. His single claim was that judicial interference by the trial judge violated his federal constitutional right to a fair trial. United States District Judge Charles S. Haight, Jr. referred the petition to United States Magistrate Joel J. Tyler. The magistrate issued a report and recommendation, concluding that the petition should be denied (App. Exh C, p.

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[4] In New York, the intermediate appellate court has special authority to review unpreserved claims in the "interest of justice" even in the absence of objection. New York Criminal Procedure Law §470.15(3)(c). The New York Court of Appeals does not possess that special power. New York Criminal Procedure Law §470.35.

8). Pointing to Peterson's failure to object at trial to the alleged instances of interference, the magistrate found that the federal constitutional claim of judicial interference was forfeited (App. Exh. C, pp. 26, 35, 46-47). The magistrate also concluded that the reasonable interpretation of the Appellate Division's decision required the conclusion that it had upheld the People's claim of a procedural bar (App. Exh. C, p. 35). On January 11, 1989, Judge Haight issued a memorandum opinion and order adopting the magistrate's report and recommendation in its "entirety," and denying and dismissing the petition (App. Exh. D, p. 60).

The Second Circuit

Peterson appealed to the United States Court of Appeals for the Second Circuit. In response to Peterson's effort to raise the merits of the judicial misconduct claim, the state argued that:

(1) since the state courts did not pass upon any federal question in determining Peterson's appeal, under Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969), there is a presumption "that the omission was due to want of proper presentation in the state courts"; (2) "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court not review a constitutional claim raised where no trial objection was made in state court; and (3) the new rule of construction announced in Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), should not be applied to cases in which the state appeals were decided prior to it. In addition, the People argued that even if the Second Circuit were to review the merits of Peterson's petition, the state trial judge's participation in questioning the witnesses clearly did not deprive Peterson of a fair trial.

The Second Circuit, however, relying on this Court's opinion in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038, 103 L.E.2d 308 (1989), found that the state appellate court had issued a decision that was ambiguous as to whether a state procedural rule was being invoked and that in those circumstances the district court was obliged to determine the merits of the federal constitutional judicial interference claim despite the lack of objection at trial (App. Exh. E, pp. 67-69). Accordingly, the Second Circuit reversed and remanded the action to the District Court for consideration of Peterson's claim.

REASONS FOR GRANTING THE WRIT

In the memorandum decision of the New York Supreme Court, Appellate Division, First Department, three of the five justices stated that they were affirming Peterson's conviction "in view of the overwhelming proof of [Peterson's] guilt"

but added,"[w]e must note, however, the inappropriateness of [the] Criminal Term's unwarranted and excessive intrusion into the conduct of the trial . . . . Had the proof of guilt not been established by such overwhelming evidence, as was here presented, the result of our review might well have been different" (App. Exh. A, p. 4). Because the Appellate Division did not expressly address any federal constitutional claims, the only reasonable interpretation of the opinion is that the court did not reach the legal merits of Peterson's claims.[5] Under established principles of New York law, where a claim of undue interference is preserved and made out, a harmless error exception does not apply and the state

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[5]As noted above, Justice Sidney Asch concurred in the result only (App. Exh. A, p. 4) and Justice Theodore Kupferman, in a separate memorandum opinion, wrote, "I would merely affirm" (App. Exh. A, p. 5).

appellate court must reverse.[6] People v. Mees, 47 N.Y.2d 997, 420 N.Y.S.2d 214, 394 N.E.2d 283 (1979). Since the Appellate Division here criticized the trial judge's conduct but declined to review the merits of Peterson's claim, it necessarily found that the claim was not preserved. That the opinion was not crystal clear should not now open the state conviction to full scrutiny where the state had no reason to make it clearer at the time.

These facts pose three significant issues: (1) whether, in instances where a state appellate court does not indicate that it has passed upon a federal question, there is a presumption under

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[6]In federal cases, various Circuit Courts have found that the claim of judicial interference is subject to a harmless error analysis. United States v. DiPaolo, 804 F.2d 225, 232-233 (2d Cir. 1986); United States v. Wilensky, 757 F.2d 594, 598 (3rd Cir. 1985); United States v. Lott, 751 F.2d 717, 721 (4th Cir.), cert. denied, 470 U.S. 1087, 105 S.Ct. 1852, 85 L.E.2d 150 (1985); see United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986) (Kennedy, Cir. J.).

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), "that the omission was due to want of proper presentation" and that its decision rests on state law grounds; (2) whether "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court not review the merits of a constitutional claim raised where no trial objection was made in state court and a federal appeals court would have been without authority, absent "plain error," to review the claim were the case a federal, not state prosecution; and (3) whether the interest in federal-state comity precludes the application of the new rule of construction announced in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), to cases in which the state appeals were decided prior to it.

1. This case presents the important question whether the rule announced in Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360,

22 L.Ed.2d 576, 579 (1969) -- that where a state court does not pass upon a federal question, there is a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved in this Court can affirmatively show the contrary" -- should apply to habeas corpus proceedings.

This Court recently addressed a related question. In Harris v. Reed, the Court decided to apply to habeas corpus proceedings certain quasi-jurisdictional principles previously used in determining whether certiorari should be granted. ___ U.S. at ___, 109 S. Ct. at 1040, 103 L.E.2d at 313 (1989). More particularly, the Court extended to habeas corpus proceedings the "plain statement" rule. Id. Under that rule, where a state court addresses federal issues as well as independent state law grounds for its decision, absent a plain statement that a state appellate court relied on a state procedural rule in rejecting a defendant's

claim, there is no presumption that the state court applied the state procedural rule. Applying the "plain statement" rule to federal habeas review, the Court held that absent that presumption, there is no forfeiture bar to consideration of the federal claim on federal habeas corpus review under Wainwright v. Sykes, 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503, 2506, 53 L.Ed. 594, 604, 608 (1977). Harris v. Reed, ___ U.S. at ___, 109 S.Ct. at 1043, 103 L.Ed.2d at 317.

Accepting the principle that the rules previously associated with certiorari review might provide an appropriate framework for a determination of when there should be habeas corpus review, necessarily raises the question of whether a companion principle to the "plain statement" rule -- the one announced in Street v. New York, 394 U.S. at 582, 89 S.Ct. at 1360, 22 L.Ed.2d at 579 (1969) -- should not likewise apply

to habeas corpus proceedings. In Street, the Court made plain that where a state court does not discuss a federal question, there is a presumption that there was a lack of proper presentation of the federal claim in the state court by the litigant "unless the aggrieved in this Court can affirmatively show the contrary." Id. The presumption announced in Street continues to thrive and has not been disturbed by the "plain statement" rule. See e.g., Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474, 487 (1987).

Whether the Street rule should follow the "plain statement" rule into habeas corpus jurisprudence is an important issue. The Second Circuit has concluded in this case that unaddressed federal claims must always be decided on their merits. There is simply no reasoned basis for that conclusion. The far more

reasonable approach is the Street rule, and that rule should be extended to habeas corpus litigation. Failure to apply it leaves habeas corpus litigation in the anomalous situation that the Second Circuit has placed it. It requires federal courts to consider claims on collateral review when the most reasonable view is that a state procedural bar prevented those claims from being reviewed in state court.[7]

2. Independent of whether the Street principle should apply is whether "law[*] and justice," 28 U.S.C. § 2243, inevitably mandate

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[7]When one recognizes that New York's rules concerning judicial intervention are stricter than the federal standard, it becomes plain that the state's silence on the federal issue of judicial interference was due to the procedural bar. Under New York law, a preserved, meritorious claim of improper judicial interference mandates reversal regardless of the weight of the evidence. People v. Mees, 47 N.Y.2d 997, 998, 420 N.Y.S.2d 214, 215, 394 N.E.2d 283, 284 (1979). Since the intermediate appellate court referred to the weight of the evidence, it necessarily was considering whether to consider an unpreserved claim under its special interest of justice power.

that a federal habeas court grant full review on the merits of a constitutional claim where no trial objections were made in state court, simply because the state appellate courts arguably did not invoke a procedural rule. In federal criminal proceedings, the absence of a trial objection forecloses federal appellate review absent "plain error." New York, however, does not require a finding of "plain error." Rather, an intermediate appellate court has special authority to review unpreserved claims in the "interest of justice." New York Criminal Procedure Law §470.15(3)(c). Here, the Appellate Division apparently declined to exercise that power, but spoke ambiguously on the point. As a result, the Second Circuit has decided that the district court must now determine whether judicial conduct at the state trial rose to a level of "interference" barred by the federal constitution.

That result is anomalous in the extreme. Had this been a federal trial, the absence of trial objection would have foreclosed federal appellate review absent "plain error." But since this is a state case a more permissive rule will be applied, and conceivably state defendants will obtain relief where federal defendants in an identical position could not. The federal-state tension created by the Second Circuit mandate of full merits review of unobjected-to trial errors is very significant.

Notably, more is involved here than the procedural question of when procedural defaults will or will not be enforced. Title 28 of the United States Code section 2243 requires that a habeas corpus petition be disposed of as "law and justice" require, and petitioners' position is that "law and justice" cannot entitle state prisoners to plenary federal review of their claims in situations where federal defendants

could not obtain such review. Although more than fifty cases in this Court have mentioned the "law and justice" phrase, the efforts to interpret it have been tentative and inconsistent.[8] This

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[8] See, e.g., Hilton v. Braunskill, 481 U.S. 770, 775, 107 S.Ct. 2113, 2118, 95 L.E.2d 724, 732 (1987)(enables federal court to delay release of successful habeas corpus petitioner); Kuhlmann v. Wilson, 477 U.S. 436, 449 n. 11, 106 S.Ct. 2616, 2625 n. 11, 91 L.Ed.2d 364, 378 n.11 (1986) (plurality) (implicates sensitivity to competing interests); Smith v. Murray, 477 U.S. 527, 539-555, 106 S.Ct. 2661, 2669-2677, 91 L.Ed.2d 434, 448-455 (1986) (Stevens, J., dissenting) (in procedural default context requires consideration of type of claim); Murray v. Carrier, 477 U.S. 478, 500-501, 106 S.Ct. 2639, 2651-2652, 91 L.Ed.2d 397, 416-417(1986) (Stevens, J., concurring)(same); Stone v. Powell, 428 U.S. 465, 478 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976)(represents a broad power, but equitable considerations may limit its exercise); Peyton v. Rowe, 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556, 20 L.Ed.2d 426, 434 (1968) (permits "appropriate relief" other than immediate release); Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct. 822, 844, 9 L.Ed.2d 837, 864 (1963) (permits federal court only to order release); Salinger v. Loisel, 265 U.S.224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989, 996 (1924) (lays down no specific rule); Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (calls for "substantial justice" to result); In Re Bonner, 151 U.S. 242, 261, 14 S.Ct. 323, 327, 38 L.Ed. 149, 153 (1894)

(continued...)

Court's own varied view justifies review in this case.

Whether "law and justice," 28 U.S.C. § 2243, do or do not require consideration of constitutional claims of error at state trials under circumstances foreclosing review of parallel situations arising at federal trials is an important issue. Indeed, the "equitable nature" of the writ of habeas corpus demands that "in some circumstances consideration of comity . . . require[s] a federal court to forego the exercise of its habeas corpus power." Stone v. Powell, 428 U.S. 465, 478 n. 11, 96 S.Ct. 3037, 3044 n. 11, 49 L.Ed.2d 1067, 1078 n. 11 (1976).

It is difficult to believe that, by Harris v. Reed, this Court intended to permit the wholesale litigation of federal arguments and the overturning of state convictions where no

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[8](...continued)
(invests court with "largest" power to control form of judgment).

constitutional objection was made at the trial level. Yet, that is what the Second Circuit has mandated. It calls for consideration of the merits of a constitutional issue never raised at trial level. Importantly, the court's decision places federal courts in a position in which they are now required to adjudicate, on collateral federal review, claims of state trial errors under circumstances, where, if the same events had occurred in a federal trial, the claims of error would be beyond review on federal appeal absent "plain error." Thus, the question of whether Harris v. Reed requires such an approach mandates the consideration of the Court.

3. Finally, an important issue of retroactivity principles is raised by this case. Prior to Harris v. Reed, the Second Circuit established a rule similar to the Street rule. Unless the state appellate court indicated in some fashion that it had considered the merits of a

federal constitutional claim, the Second Circuit had presumed that the state court had not considered them, so long as a procedural forfeiture argument had been made by the prosecution on state appeal. Rodriguez v. Scully, 788 F.2d 62, 63 (2d Cir. 1986)(citations omitted); Martinez v. Harris, 675 F.2d 51 (2d Cir.), cert. denied, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); Gruttola v. Hammock, 639 F.2d 922, 928-929 (2d Cir. 1981). The result was that the state appellate courts were not obliged to issue written opinions invoking state procedural rules in order to ensure that state court judgments would not be overturned in federal collateral proceedings despite defendants' procedural defaults. If Harris v. Reed mandated adoption of a "new rule," the question remains whether or not that new rule should be applied to cases in which the state appeals were decided prior to Harris v. Reed.

Here, not only was the state appeal concluded, but in addition, the petition was filed, and a judgment was rendered by the district court, well before Harris v. Reed was decided. Since the Second Circuit rule of construction existed at the time of Peterson's conviction and was well established, the state had every reason to rely on its applicability. Thus, the state appellate judges had no reason to think it was important for them to specify that they had relied on state procedural grounds in rejecting Peterson's claims. Yet, the Second Circuit found that Harris' new rule should be applied retroactively, and unexpectedly attached determinative significance to the lack of clarity in the state's opinion in the case. Whether it is appropriate to so defeat the reasonable expectations of the state judiciary, and possibly release state convicts whose convictions in fact were affirmed on state procedural grounds, is a

significant question that should be considered by this Court.

* * * * *

Plainly, this case presents important issues concerning habeas corpus jurisprudence and the finality of state court judgments. By seeking certiorari, we seek vindication of the view that federal habeas courts should not adjudicate federal claims where no federal objections were presented at trial and where the state appellate court had no reason to consider the federal claim. Any other view upsets the established norms of federal-state comity. In addition, we seek clarification of the Harris v. Reed decision. We ask the Court to determine whether Harris' new rule of construction should be applied retroactively to cases decided prior to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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